CGU INSURANCE BHD

v.

ASEAN SECURITY PAPER MILLS SDN BHD & OTHER APPEALS

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NOS: 02-2-2001(A), 02-3-2001(W) & 02-4-2001(W)]
8 FEBRUARY 2002

COMPANY LAW: *Winding up - Proceedings against company - Leave of court, whether required - Definition of "action or proceeding … against the company" - Appeal by defendant against decision of court given in favour of company under liquidation - Application by defendant for security for costs against company - Whether amounted to proceedings against the company - Whether merely 'defensive actions' - Companies Act 1965, s. 226(3)*

WORDS & PHRASES: *"action or proceeding … against the company" - Companies Act 1965, s. 226(3) - Interpretation of - Leave of court, when required*

The questions of law that arose for decision in the instant appeal before the Federal Court were: (1) whether an appeal against a decision of court given in favour of a company under liquidation amounts to an "action or proceeding" within the meaning of s. 226(3) of the Companies Act 1965 ('the Act') – such that no appeal may be commenced without the leave of the court; and (2) whether an application for security for costs by a defendant in an action commenced by a company under liquidation amounts to an "action or proceeding" within the meaning of s. 226(3) of the Act – such that no application for security for costs may be commenced without the leave of the court.

Held:
Per Steve Shim CJ (Sabah & Sarawak)

[1] The words "action or proceeding" in s. 226(3) of the Act must not be construed in isolation. The entire phrase "When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced **against the company** except by leave of the court …" must be read in its context. In particular, the word "proceeding" must be read in tandem with the words "against the company". (p 7 a-c)

[2] Consequently, the words "against the company" must signify a proceeding where the liability is intended to be fastened on the company or its assets and **not** a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. In other words, where a company has initiated a proceeding in a court of law, whether before or after the winding up order, **no** permission of the company judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him. If a company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any **defensive action** by way of appeal, revision, review or setting aside of an *ex parte* decree or order, should **not** require the permission of the company judge. (pp 7 h-i, 8 a-c, g-i, 9 a-c, h-i)

[3] Accordingly, the appellants' appeal to the Court of Appeal against the decision of the trial judge given in favour of the respondent as well as the appellants' application for security for costs were 'defensive actions' which did not come within the tether of s. 226(3) of the Act. They were not 'actions or proceedings against the company' and the leave of the court was thus unnecessary. (pp 9 i & 10 a-c)

[Appeals allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Persoalan-persoalan undang-undang yang berbangkit di dalam rayuan semasa di hadapan Mahkamah Persekutuan adalah: (1) sama ada sesuatu rayuan terhadap keputusan mahkamah yang telah diberikan memihak kepada sebuah syarikat di bawah penyelesaian merupakan suatu "tindakan atau prosiding" di dalam lingkungan maksud s. 226(3) Akta Syarikat 1965 ("Akta tersebut") – supaya tiada rayuan boleh dimulakan tanpa kebenaran mahkamah; dan (2) sama ada sesuatu permohonan untuk jaminan bagi kos oleh defendan di dalam sesuatu tindakan yang dimulakan oleh sesebuah syarikat di bawah penyelesaian merupakan "tindakan atau prosiding" dalam lingkungan maksud s. 226(3) Akta tersebut – supaya tiada permohonan untuk jaminan bagi kos boleh dimulakan tanpa kebenaran mahkamah.

Diputuskan
Oleh Steve Shim HB (Sabah & Sarawak)

[1] Perkataan-perkataan "tindakan atau prosiding" di dalam s. 226(3) Akta tersebut tidak boleh ditafsirkan secara bersendirian. Keseluruhan ungkapan "Apabila sesuatu perintah penggulungan telah dibuat atau penyelesai sementara telah dilantik tiada tindakan atau prosiding boleh diteruskan

dengan atau dimulakan terhadap syarikat tersebut kecuali dengan kebenaran mahkamah ..." mestilah dibaca menurut konteksnya. Khususnya, perkataan "prosiding" mestilah dibaca sejajar dengan perkataan "terhadap syarikat tersebut".

[2] Akibatnya, perkataan-perkataan "terhadap syarikat tersebut" semestinya menandakan satu prosiding di mana tanggungan diniatkan supaya dikenakan ke atas syarikat tersebut atau aset-asetnya dan bukannya satu prosiding yang dimulakan oleh seseorang yang bertujuan untuk lari daripada tanggungannya yang berbangkit daripada prosiding yang dimulakan oleh syarikat itu sendiri. Dalam kata-kata yang lain, di mana sesebuah syarikat telah memulakan satu prosiding di dalam mahkamah undang-undang, sama ada sebelum atau selepas perintah penggulungan, kebenaran hakim syarikat tidak diperlukan bagi apa-apa yang dilakukan oleh defendan atau pihak yang berlawanan untuk lari daripada tanggungan yang diniatkan untuk diletakkan padanya. Jika sesebuah syarikat telah memulakan sesuatu guaman atau prosiding lain untuk menguatkuasakan sesuatu tuntutan, sebarang tindakan yang diambil oleh defendan atau pihak yang bertentangan melalui pembelaan, atau jika syarikat tersebut telah mendapatkan dekri atau perintah, sebarang tindakan pembelaan melalui rayuan, semakan, kajian semula atau pengenepian dekri atau perintah *ex parte*, tidak seharusnya memerlukan kebenaran hakim syarikat tersebut.

[3] Sehubungan itu, rayuan perayu-perayu kepada Mahkamah Rayuan terhadap keputusan hakim perbicaraan yang diberikan atas nama responden dan juga permohonan perayu untuk jaminan bagi kos adalah "tindakan-tindakan pembelaan" yang mana tidak terlingkung di dalam bidang s. 226(3) Akta tersebut. Ianya bukan "tindakan-tindakan atau prosiding terhadap syarikat tersebut" dan kebenaran mahkamah adalah dengan itu tidak perlu.

[Rayuan-rayuan dibenarkan.]

Case(s) referred to:
Humber & Co v. John Griffiths Cycle Co [1901] 85 LT 141 ***(foll)***
Rahmat Ali Fatehullah v. Calcutta National Bank Ltd [1955] AIR Alla 169 ***(foll)***
Rawat Raj Kumar Singh & Ors v. Benares Bank Ltd, Benares (In Liquidation) & Ors [1941] AIR All 154 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 226(3)
Courts of Judicature Act 1964, s. 3

Companies Act [India], s. 171

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[Appeal from Court of Appeal, Civil Appeal Nos: A-02-338-2000, W-02-115-2000 & W-02-29-2000]

Reported by Gan Peng Chiang

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

There are three appeals before us, all involving the same issue of law. As such, we propose to deal with them together. Leave to appeal was granted by the Federal Court on 22 February 2001 on the following questions:

(1) Whether an appeal against the decision in favour of a company under liquidation falls within the meaning of the phrase 'action or proceeding' in section 226(3) of the Companies Act, 1965, so that no appeal could be prosecuted without leave under the said provision.

(2) Whether an application for security for costs by a defendant in an action commenced by a company under liquidation falls within the meaning of the phrase 'action or proceeding' in section 226(3) of the Companies Act, 1965, so that no application for security for costs could be commenced and/or proceeded with, without leave under the said provision.

Although the questions turn essentially on s. 226 of the Companies Act 1965 (hereinafter "the Act"), a brief narrative of the background facts is in order. Asean Security Paper Mills Sdn. Bhd. (the respondent) was a company set up as an ASEAN Industrial Joint Venture to manufacture high quality security paper. On 6 September 1989, the respondent insured its warehouse, forklift and stock-in-trade with two insurance companies ie, Provincial Insurance (hereinafter "Provincial") and Commercial Union Assurance (now known as CGU), the appellants herein. On 11 September 1989, a fire destroyed the respondent's warehouse, forklift and stock-in-trade. In the result, the respondent commenced actions against the appellants ie, against CGU in the Ipoh High Court and against Provincial in the Kuala Lumpur High Court. On 5 October 1992, the respondent was wound up pursuant to a winding-up order of the Kuala Lumpur High Court following which the official receiver was appointed the Provisional Liquidator. Subsequently, one Mr. Lim Tian Huat of Messrs Arthur Andersen & Co. was appointed Liquidator on 7 September 1993. As a result of the winding-up, both CGU and Provincial applied for security of costs to be borne by the respondent in each case. The Ipoh High Court dismissed CGU's application holding that s. 226(3) of the Act made it

mandatory for leave of the winding-up court to be obtained before making such an application. However, the Kuala Lumpur High Court took a different view on Provincial's application, by allowing the application and ordering the respondent to provide RM100,000 as security for costs. The respondent appealed to the Court of Appeal. The appeal was allowed. In the meantime, the trial of the Ipoh suit commenced on 18 May 1999 at the end of which the trial judge gave judgment in favour of the respondent in the sum of RM16,124,500 with interests and costs. Against that decision, CGU filed an appeal to the Court of Appeal on 19 May 2000. Then, on 13 September 2000, the respondent applied to strike out the said appeal on the ground that the appellant had not obtained leave of the winding-up court pursuant to s. 226(3) of the Act. The Court of Appeal allowed the application and consequently struck out the appeal with costs.

It seems clear that the main focus in these appeals is this: whether an appeal against the decision in favour of a company under liquidation or an application for security of costs against such a company, falls within the meaning of the phrase "action or proceeding … proceeded with or commenced against the company" so that neither form or approach could be undertaken without leave of the winding-up court. Quite obviously, the two questions upon which leave was granted turn very much on the construction to be placed on s. 226(3) of the Act. In this connection, the Court of Appeal has clearly taken the stand in the affirmative. This is reflected in the following passages in the judgment of the Court of Appeal which read:

> … In the present application, it is clear to us that certain restrictions have been imposed by the law on any party commencing or proceeding to take up any action against a company which has wound up. One of them is section 226(3) of the Companies Act. The words in section 226(3) are 'action' and 'proceeding'. Section 3 of the Courts of Judicature Act 1964, defines those words as follows:
>
> > 'action' means a civil proceeding commenced by writ or in such other manner as prescribed by rules of court but does not include a criminal proceeding;
> >
> > 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.
>
> It is clear to us that the Courts of Judicature Act defines an appeal as a 'proceeding' within the meaning of section 67 of the Act. That being the case, any appeal to be proceeded upon is subject to the restrictions imposed ...

… In *Rawat Raj Kumar Singh & Ors v. Benares Bank Ltd (In Liquidation) & Ors* [1941] AIR All 154 where it was held that where a decree in favour of a company had been passed and the judgment debtor had appealed from the decree and went on with his appeal at the date of the winding-up of the company, he should be regarded as proceeding with legal proceeding against the company and he could not do so without leave of the court. At pages 155 and 156 Braund J said:

> … The proceeding on foot at the date of the winding-up order was the appeal by the company and it was open to the company to go on with that appeal without the leave of the court. With that introduction, it is possible to see what it was that Lord Davey in his speech actually said. He said this:
>
> > ... The respondents, that is to say the company, 'now' object that the present appellants cannot proceed with their appeal without the leave of the court in Ireland. I am of the opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and **when once an action by the company itself has been proceeded with, there is necessity for the defendants** in the action to obtain leave for any defensive proceeding on their part …
>
> The bold are, of course, my own but in my view, the words they cover afford the clue to what it was that the House of Lords really said in this case.

In coming to the conclusions aforesaid, the Court of Appeal has obviously relied on s. 3 of the Courts of Judicature Act 1964 (hereinafter "the CJA") and the Indian case of *Rawat Raj Kumar Singh & Ors v. Benares Bank Ltd, Benares (In Liquidation) & Ors* [1941] AIR All 154.

In advancing the proposition that the Court of Appeal has erred in relying on s. 3 of the CJA, counsel for the appellant submits that the definition of "proceeding" therein should be confined to the said Act and has no application to s. 226(3) of the Act. In rebuttal, counsel for the respondent contends that there is no reason to depart from the interpretation of the word "proceeding" in s. 3 while interpreting that word occurring in s. 226(3) of the Act as the context in which the word "proceeding" has been used in s. 226(3) of the Act does not call for an interpretation different from the one in s. 3 of the CJA. According to him, the meaning is so clear and unambiguous that there is no possibility of construing the word in any other way.

Both counsel seem to have concentrated their efforts solely on the proper construction of the word "proceeding" *per se* in s. 226(3) of the Act. That, in our view, is not entirely adequate. What is on target is to focus on the whole phrase "action or proceeding …. proceeded with or commenced against the company." In our view, it is crucial to examine the word "proceeding" in tandem with the words "against the company" in s. 226(3) of the Act. In this connection, we are particularly attracted by the observations of the House of Lords in *Humber & Co v. John Griffiths Cycle Co* [1901] 85 LT 141 but more significantly, the powerful and well modulated arguments proffered in the Indian case of *Rahmat Ali Fatehullah v. Calcutta National Bank Ltd* [1955] AIR Alla 169.

In *Humber*, the respondent company was wound up during the pendency of their appeal to the Court of Appeal. The respondent won the appeal and this prompted the appellant to appeal to the House of Lords. The respondent then raised a preliminary objection contending that leave of the winding-up court was necessary before the appellant could proceed with the appeal. In dealing with the said preliminary objection, Lord Davey said this:

> I am of opinion that the objection cannot be maintained. It was the respondent who themselves proceeded with the action after the winding up order by prosecuting their appeal in the Court of Appeal and when once an action by the company itself has been proceeded with, there is **no** necessity for the defendants in the action to obtain leave for any defensive proceeding on their part.

In *Rahmat Ali*, the Full Bench of the Allahabad High Court had embarked on an exhaustive and comprehensive review of the whole range of options decided in previous cases including *Humber* and *Rawat Raj Kumar* in construing s. 171 of the Indian Companies Act (which is in *pari materia* with our s. 226(3) of the Act) and finally came to the following conclusions:

> (17) Whenever a matter comes up before a court and an objection is taken that leave under s. 171 Companies Act had not been obtained, the Court has to decide whether it is a suit or other legal proceeding against the company. If the words 'against the company' merely mean that the company is arrayed as the opposite party, as was held by Braund J, permission of the Company Judge would be necessary whenever any legal proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to court and has instituted the proceeding, which it can do without the leave of the Company Judge, the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself. To hold that would put the defendant in a difficult position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated, to take the permission of the Company Judge.

The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case, the question whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference.

(18) In [1901] 85 LT 141 (J), Lord Davey said:

> It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is **no** necessity for the defendants in that action to obtain leave for any defensive proceeding on their part.

Braund J. distinguished those observations and confined them to a case where the action had been taken by the company and proceeded with after the winding-up order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding-up order, his decision would have been the other way.

(19) This appears to us to be also just and proper as in such a case, it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation proceedings under the Companies Act are for making available the assets of the company in *pari passu* satisfaction of its liabilities, and if persons other than secured creditors are allowed to enforce their claims without any control exercised by the Company Judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding-up order, no permission of the Company Judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceedings in a court of law are started by a person other than the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into court by the company itself, the permission of the Company Judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the

> company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the Company Judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an *ex parte* decree or order, should not require the permission of the Company Judge.

Clearly, *Rahmat Ali* and *Humber* have enunciated what can be termed as the "defensive action" approach. Such an approach seems to strike a balance between the need to protect the interests of the company under liquidation on the one hand and render due justice to a defendant on the other.

As we said, the Court of Appeal, in the instant case, did not address itself to the cases aforesaid, but relied essentially on *Rawat Raj Kumar* citing, in support, the passages reproduced earlier. In this regard, we should perhaps draw attention to Braund J's citation of Lord Davey's observations in *Humber* which, for the sake of emphasis, requires repetition herein:

> ... The respondents, that is to say the company 'now' object that the present appellants cannot proceed with their appeal without the leave of the Court in Ireland. I am of the opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is necessity for the defendants in the action to obtain leave for any defensive proceeding on their part ...

Quite clearly, there is a serious omission in the citation underscored above. The original report in The Law Times on *Humber* quoted Lord Davey as having actually stated that "there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part." The omission of the word "no" places an entirely different complexion on the views expressed by Lord Davey. It has created a distorted reflection of his views. The misquote has rendered the conclusions arrived at by Braund J in *Rawat Raj Kumar* totally unreliable. In the circumstances, the Court of Appeal's reliance on *Rawat Raj Kumar* must be regarded as being inappropriate and misconceived.

Having considered the relevant authorities, we prefer the approach adopted in *Humber* and *Rahmat Ali*. Although we accept that an appeal or an application for security of costs can be construed as a proceeding per se, nevertheless it is essential to determine whether it is a proceeding being instituted or commenced against the company under liquidation in s. 226(3) of the Act and that must necessarily depend on whether the said proceeding is in the nature of a defensive action or otherwise. The factual circumstances therefore come into play. In the Ipoh suit, the facts show that the appeal lodged by the

appellant is not a proceeding intended to fasten liability on the respondent (the company under liquidation) or its assets but is essentially a proceeding commenced or instituted by the appellant with the object of exculpating itself from liability arising out of an action commenced or initiated by the respondent. The appellant is not a claimant as such nor is it a creditor of the respondent. It is not seeking to make any inroads into the assets of the respondent but merely to set aside a liability pinned on it by virtue of a successful action brought against it by the respondent. Clearly, the appeal is in the nature of a defensive action. The same must apply to the application for security of costs lodged by the appellant in the Kuala Lumpur suit. In the circumstances, we take the view that the appeal or the application for security of costs does not fall within the meaning of the phrase "action or proceeding ... proceeded with or commenced against the company" in s. 226(3) of the Act.

Given the conclusions above and for the reasons stated, the answers to both the questions posed for our consideration must be in the negative. Accordingly, the appeals are allowed with costs and the deposits refunded to the appellants.